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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HARVEY F. GARLOTTE,

Petitioner,

vs.

KIRK FORDICE,
Governor of Mississippi,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a federal court in habeas corpus have jurisdiction to consider challenges to the first of two consecutive sentences, when the petition is filed after the time of the first sentence has expired?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of claims, already considered in the state court, by a person who is legally in prison on other charges. Such unnecessary relitigation is contrary to the rights of society which CJLF was formed to advance.

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1. Both parties have given written consent to the filing of this brief.

SUMMARY OF FACTS AND CASE

In 1985, petitioner Garlotte pleaded guilty to possession of marijuana. The same day he pleaded guilty to two counts of murder. He was sentenced to three years in prison on the marijuana charge and life in prison for the murders, to be served consecutively in that order. Pet. for Cert. 3-4; Brief in Opposition 2. Approximately a year later, he filed a motion for state post-conviction relief, which was denied. Pet. for Cert. 4-5. He appealed the denial to the Mississippi Supreme Court, which affirmed in a published opinion. *Garlotte* v. *State*, 530 So. 2d 693 (1988).

Garlotte then waited another year before filing his federal habeas petition. He says he was too busy litigating his murder convictions and conditions of confinement to pursue the matter promptly. Pet. for Cert. 5. The District Court denied relief on the merits. *Id.*, App. B, C, D. Circuit Judge Duhé granted a certificate of probable cause and directed briefing on the question of whether Garlotte's allegations of involuntary plea and ineffective assistance of counsel could be dismissed without requiring the state to file and without an evidentiary hearing. *Id.*, at App. G.

On the appeal, the state noted for the first time that the marijuana conviction had expired before the habeas petition was filed. *Garlotte* v. *Fordice*, 29 F. 3d 216, 217 (CA5 1994) (*per curiam*). The Court of Appeals affirmed the order of dismissal on the ground of lack of jurisdiction. *Id.*, at 218.

SUMMARY OF ARGUMENT

The question in this case is not whether petitioner should be given a day in court, but whether we should spend the resources to give him a *third* when he has already had two. Such extensive relitigation may arguably be justified when the continued, wrongful incarceration of an innocent man is a possibility, but that risk is not present here. Garlotte is properly in prison on two convictions of murder not challenged here. The extremely speculative possibility that he might be paroled a few months earlier if the marijuana conviction is overturned is insufficient to justify the cost of relitigation.

Petitioner's reliance on the tradition of habeas corpus is misplaced. The true tradition weighs heavily against his position. Habeas corpus was traditionally a remedy exclusively for people held in custody illegally and entitled to immediate release. The cases petitioner relies on come from a narrow slice of habeas history, and the approach of that era has since been discredited.

ARGUMENT

I. Garlotte has already had his day in court; the question is whether the state must endure another one.

The question in this case is definitely not one of "denying to petitioner his ultimate day in court." Cf. Brief for Petitioner 29, n. 21, quoting *Carafas* v. *La Vallee*, 391 U. S. 234, 239 (1968).[2] Garlotte's claims have already been made. They have already been reviewed. They have already been decided. The highest court of the state has written a published opinion on them. *Garlotte* v. *State*, 530 So. 2d 693 (Miss. 1988).

The question presented is whether the state, having marshalled its resources once to prosecute Garlotte and again to defend its judgment on state collateral attack, must do so a third time in federal court. In a world of unlimited resources, there would be less objection to such a procedure, but resources are always limited. A decision to spend them on this purpose is *per se* a decision not to spend them on something else. In the real world, a rational government must balance the cost of avoiding a risk against the likelihood and severity of the danger. See S. Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 18-19 (1993).

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2. References to petitioner's brief are to the copy served on March 1. We understand petitioner intends to make an amendment which may alter the pagination of the final copy.

A. The Cost of Relitigation.

In noncapital cases, the principal cost to the states of relitigation on federal habeas corpus lies not in the very few claims that have merit but in the vast bulk that do not. A recent study of noncapital habeas by the National Center for State Courts showed that out of 1,626 petitions a mere 17 were granted. V. Flango, Habeas Corpus in State and Federal Courts 61 (1994).

Searching the haystack for needles would be less of a problem for the state if more petitions could be summarily dismissed without an answer. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") was drafted with this in mind. "[I]t is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer." Advisory Committee Note to Habeas Rule 4.

The Court of Appeals' initial action in this case, before discovery of the jurisdictional defect, illustrates how the changing nature of constitutional litigation has overtaken the summary screening procedure contemplated by the drafters of the Habeas Rules. Among Garlotte's claims were "that his guilty plea was involuntary and that he was denied effective assistance of counsel." Order, App. G to Pet. for Cert. 1. Given the extraordinarily broad meaning of the term "involuntary," Circuit Judge Duhé appeared skeptical that such claims could ever be dismissed under Rule 4. He granted the certificate of probable cause and ordered briefing on "the issue of whether the district court prematurely dismissed the petition without requiring an answer and without conducting an evidentiary hearing." *Id.*, at 2.

It was not supposed to be this way. When this Court laid down the rule of *Boykin* v. *Alabama*, 395 U. S. 238 (1969), it did so on the explicit premise that the record so established would be "adequate for any review that may later be sought [citations], and forestall[] the spin-off of collateral proceedings that seek to probe murky memories." *Id.*, at 244 (footnotes omitted). The trial judge in Garlotte's case "conducts one of the most thorough and explicit plea hearings [the Mississippi

Supreme] Court has had the opportunity to read." *Garlotte* v. *State*, *supra*, 530 So. 2d, at 694. The federal magistrate agreed. Report and Recommendation, App. B to Pet. for Cert. 3. Yet the collateral proceeding was not forestalled.

Then there is ineffective assistance. In *Strickland* v. *Washington*, 466 U. S. 668 (1984), the Court recognized the danger. "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Id.*, at 690.

T[illegible] *Strickland* Court evidently thought it had crafted the stand[illegible] to avoid proliferation, but it has not turned out that way [illegible]ective assistance is claimed in nearly half of federal habea[illegible]ons. Flango, Habeas Corpus in State and Federal Courts, [illegible] at 45. It is easily the most common claim in federal pe[illegible] in diverse jurisdictions around the country. *Id.*, at 58, Table 15, under heading "Federal Courts" (data from Alabama, California, New York, and Texas).

Claims that the attorney gave incompetent advice, see *Strickland*, *supra*, at 687, or failed to completely investigate, see *id.*, at 690-691, are not the kinds of claims that lend themselves to summary disposition. They are also not claims that the state can protect itself against, because the shroud of attorney-client privilege limits the state's ability to supervise the attorney in these matters.

Given the present state of the law, then, if these matters are cognizable on federal habeas corpus in a particular case, they will frequently require proceedings beyond the screening contemplated by Rule 4.[3] From a policy standpoint, the question is whether the risk that the state courts have overlooked a federal constitutional violation justifies the cost of litigating that question yet again, after it has already been considered and decided once. If state appellate courts catch 90% of trial errors, and state habeas courts catch another 9%, is it worth the cost of

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3. Summary disposition of claims involving facts outside the trial record would be proper where the state collateral review court has detailed its findings of fact. However, unexplained denials are the norm in these cases. See Flango, *supra*, at 66.

federal habeas to get the last 1%? Cf. Breyer, Breaking the Vicious Circle, *supra*, at 11; see also Flango, *supra*, at 62, Table 17 (grant rates). "[T]he quest for error correction must, at some point, end." S. O'Connor, Local Control of Crime 6 (1991), reprinted in Habeas Corpus Issues, Serial No. 39, 102d Cong., 1st Sess. 192, 198 (1992). The answer to that question may well depend on what remains at stake when the petition is filed.

B. Finality and Habeas Corpus.

The evolution of habeas corpus from the limited review of the jurisdiction of the original court to the *de novo* review of a vast array of constitutional questions has been thoroughly reviewed in this Court. See, *e.g.*, *Stone* v. *Powell*, 428 U. S. 465, 474-477 (1976). It need not be rehashed here. It is sufficient to note that the norm in Anglo-American jurisprudence is that judgments of competent courts are final when they are final, and that was originally true of criminal judgments challenged on habeas corpus, *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830) (Marshall, C.J.), even on constitutional grounds. *Ex parte Watkins*, 7 Pet. (32 U. S.) 568, 574 (1833) (Story, J.) (Eighth Amendment claim); *Matter of Moran*, 203 U. S. 96, 105 (1906) (Holmes, J.) (self-incrimination claim). Exceptions to the general rule of finality require justification.

Brown v. *Allen*, 344 U. S. 443 (1953) is generally thought to have established a rule of mandatory *de novo* review of constitutional questions. It is not difficult to see why such review was thought necessary in a racial discrimination case in 1953. At this point in history, there is a strong argument that although this rule needs to be changed, Congress and not the courts should change it. Compare O'Connor, Local Control of Crime, *supra*, at 8, Habeas Corpus Issues, at 200 with *Wright* v. *West*, 120 L. Ed. 2d 225, 247-248, 112 S. Ct. 2482, 2498 (1992) (O'Connor, J., concurring in the judgment).[4]

To say that only Congress should abrogate *Brown*, however, is not to say that the judiciary must extend *de novo* review to

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4. The House of Representatives recently approved the Cox Amendment to H. R. 729 to do exactly that, by a vote of 291 to 140. 141 Cong. Rec. H1427-H1428 (Feb 8, 1995).

new places where precedent does not require it. Review of the ›f two consecutive sentences, already expired by the time of ;, is such a new place.

Even though habeas corpus has been bloated beyond ·cognition, see *Braden* v. *30th Judicial Circuit Court*, 410 U. S. 484, 501 (1973) (Blackmun, J., concurring in the result), it is not yet a complete appeal to the lower federal courts of every question this Court might review on certiorari. Questions arising under federal statutes, if not fundamental, are still final when they are final. See *Reed* v. *Farley*, 129 L. Ed. 2d 277, 292, 114 S. Ct. 2291, 2300 (1994). So, too, are criminal judgments in which only a fine or other noncustodial sentence is imposed. See, *e.g.*, *Lillios* v. *New Hampshire*, 788 F. 2d 60, 61 (CA1 1986) (*per curiam*).

The custody requirement thus provides something of an "amount in controversy" limitation for habeas relitigation. Cf. 28 U. S. C. § 1332 (civil diversity jurisdiction). Judgments which only deprive the defendant of property do not create a danger of error of the same magnitude as those which deprive the defendant of liberty, and thus they warrant a lesser degree of review.

The same is true of those judgments where, although the defendant has been incarcerated, he is not subject to any further restraint as of the time of filing. Petitioner cites some pre-*Maleng* Court of Appeals cases for the proposition that the habeas court should look to the time of filing of the state "exhaustion" petitions, rather than the federal petition itself, for the custody requirement. Brief for Petitioner 29-30, n. 21. However, this Court has never endorsed such a procedure, the clear language of the statute refutes it, and *Maleng* v. *Cook*, 490 U. S. 488, 491 (1989) (*per curiam*) says the clear language controls. The proposition is also refuted by the clear language of Rule 1(a) of the Habeas Rules. Petitioners invoking section 2254 are divided into two groups: Those attacking present custody and those attacking future custody. There is no ghost of custody past. Rule 1(b) contemplates application of the Rules to other situations, but the first paragraph of the Advisory Committee Note makes clear that this refers to persons in custody other than "pursuant to a judgment of a state court," *i.e.*, not section 2254.

As a result, at least where only a single sentence is imposed, sentences so brief that they will expire before state remedies are exhausted are effectively immune from relitigation on federal habeas corpus. The state courts can prevent this effect by granting bail or own-recognizance release during the exhaustion period, see, *e.g.*, *Hensley* v. *Municipal Court*, 411 U. S. 345, 351 (1973), but if they keep the prisoner in prison so that the full sentence is served, there is no habeas relitigation.

The idea that the exhaustion requirement might prevent any habeas review at all is far from novel. It has done so from the very beginning. In the nineteenth century, state defendants had the right to a writ of error to this Court for review of their federal questions. See Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-387. Exhaustion included employment of this writ, absent exceptional circumstances. *Urquhart* v. *Brown*, 205 U. S. 179, 181-182 (1907). Thus, exhaustion originally included the resolution by this Court of every properly preserved federal question, leaving nothing to resolve on habeas.

The issues of custody, exhaustion, and multiple offenses suggest several variations on a theme. Putting aside the special question of habitual criminal enhancement, let us consider three potential habeas petitioners: A, B, and C.

- A commits burglary, is sentenced to one year in prison, and is discharged the day before his appeal is decided.

- B commits burglary, is sentenced to one year in prison, and is released the day before his appeal is decided. The next day he commits robbery and is subsequently sentenced to four years for that offense, a period sufficient to exhaust state remedies.

- C commits burglary and robbery, is sentenced to one and four years, respectively, served consecutively in that order. One year and a day later his appeal is decided.

A clearly cannot attack his burglary conviction on habeas corpus. That is the plain meaning of the custody requirement. B also cannot. That, in essence, is *Maleng* v. *Cook*. At least absent any formal use of his burglary to enhance the robbery

conviction,[5] he also cannot use any leftover grievance on the burglary to demand "credit" on the robbery. His burglary conviction is really final. It is res judicata.

Is there any reason C should have greater review rights on his burglary than A or B? If the other one-year sentences are below the threshold for habeas review, should this one be reviewable merely because it is followed by a longer sentence for a worse crime?

More graphically, let us return to Garlotte's case. If his marijuana conviction would otherwise not be reviewable on habeas due to the requirements of custody and exhaustion, should Garlotte get *greater* review rights as a reward for having murdered two people?

II. The *Peyton-Hensley* line of cases ran roughshod over earlier precedent and should not be extended.

Petitioner appeals to tradition, but the earliest case he cites in support is *Jones* v. *Cunningham*, 371 U. S. 236 (1963). See Brief for Petitioner 26-30. A discussion of tradition that *begins* in the middle of the Warren Court is like a wine list that begins with the vintage before last.

There is a very good reason for petitioner's repressed memory. The earlier cases are contrary to his position. True respect for tradition requires not only acknowledgement of the "traditional remedial purposes" of the writ, but also acknowledgement of its traditional limits.

A. The Traditional View.

An appeal to the "remedial purposes" of the writ, see Brief for Petitioner 26, immediately raises the question "remedy for what?" Penicillin has remedial purposes too, but that is no reason to prescribe it for every illness. The "remedial purpose" of habeas corpus, historically, was *custody* pure and simple. A

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5. The enhancement question remains unresolved at this point. See *post*, at 18.

court on habeas could order the prisoner released and nothing else. See, *e.g.*, *Re Medley*, 134 U. S. 160, 173 (1890).

The limited power of the habeas court was dramatically illustrated by the *McCready* case. McCready was an out-of-state oyster fisherman arrested under a Virginia protectionist act. In 1874, before the exhaustion doctrine, a federal habeas court declared the statute unconstitutional and discharged him from custody. *Ex parte McCready*, 15 F. Cas. 1345 (CCED Va. 1874). Yet the state courts reindicted and tried McCready, see *id.*, at 1346 (Reporter's Note); *McCready* v. *Commonwealth*, 27 Gratt. (68 Va.) 985 (1876), and this Court affirmed the conviction. *McCready* v. *Virginia*, 94 U. S. 391, 397 (1877).

Remarkable by its absence from the arguments and opinion in *McCready* is any contention that the habeas judgment precluded the reprosecution. Apparently it was obvious to the bar and bench in 1877 that the habeas decision had no legal effect beyond releasing McCready from custody.[6]

Thus the limitation of habeas corpus to custody and nothing but custody was firmly in place when the Court decided the famous case of *Wales* v. *Whitney*, 114 U. S. 564 (1885). Wales had simply been ordered by his military superior not to leave town and to report on a certain date for a court-martial. *Id.*, at 566. The District of Columbia court denied habeas relief, and this Court affirmed. Because this Court at that time had no appellate jurisdiction over military courts, its power in the matter was limited to the habeas power, which was purely over custody. *Id.*, at 570-571. Since Wales was not in custody within the meaning of the statute, the Court had no power to review the matter on habeas corpus. *Id.*, at 574-575.

Ex parte Baez, 177 U. S. 378 (1900) similarly follows from the same principle. Baez was convicted of a minor offense in Puerto Rico and challenged the jurisdiction of the court. *Id.*, at 385-386. Although he was still in custody under a 30-day sentence when the case reached this Court, he was scheduled to be released before the government's answer was due. The case

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6. We cite this Court's decision in *McCready* as history, not precedent. Cases are not authority for propositions not considered. *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

was dismissed as moot, because the only matter properly at issue, custody, would end before the Court could decide it. *Id.*, at 390. *Baez* was followed in *Re Lincoln*, 202 U. S. 178, 179 (1906).

In *Stallings* v. *Splain*, 253 U. S. 339 (1920), a pretrial habeas application by a federal prisoner, bail had been granted after the filing of the habeas application. *Id.*, at 340-341. Justice Brandeis, writing for the Court, stated that "Stallings's position was thereafter no better than if he had applied for the writ after he had given bail. It is *well settled* that, under such circumstances, a petitioner is not entitled to be discharged on *habeas corpus*. [Citations.] Being no longer under actual restraint . . . he was not entitled to the writ of habeas corpus. *Wales* v. *Whitney*, 114 U. S. 564." *Id.*, at 343 (emphasis added); see also *Johnson* v. *Hoy*, 227 U. S. 245, 247-248 (1913).

The consecutive sentence cases rest on this same understanding of the nature and limits of the writ. In *Re Swan*, 150 U. S. 637 (1893), the petitioner was a local constable held in contempt for seizing a barrel of liquor which was in the custody of the federal court. The contempt order had three components: (1) that he be jailed until he returned the barrel; (2) that he be jailed an additional three months as punishment; and (3) that he further remain in jail until he paid the costs of the proceedings. *Id.*, at 637-639. The Court refused to go to the merits of the order for costs, because Swan could not be discharged on habeas until he had both returned the barrel and served the punitive three months. *Id.*, at 653. *Swan* was followed on similar facts in *Tinsley* v. *Anderson*, 171 U. S. 101, 107 (1898).

Thus, when Justice Stone wrote his unanimous opinion in *McNally* v. *Hill*, 293 U. S. 131 (1934) the law was already settled. McNally had been convicted in federal court on three counts involving interstate auto theft. The first sentence was shorter than and concurrent with the second, and thus of no importance. The third, which he wished to challenge, was consecutive to the second. The second had not yet expired, but McNally had served enough to be eligible for parole under it. *Id.*, at 133-134.

The *McNally* Court proceeded to review the history and purpose of habeas corpus in England and America. *Id.*, at 136-139. Even when the judgment of conviction is void for lack of jurisdiction, the Court concluded, "its operation may be stayed by *habeas corpus* only through the exercise of the authority of the court to remove the prisoner from custody. *That authority cannot be exercised where the custody is lawful.*" *Id.*, at 139 (emphasis added).

Ex parte Hull, 312 U. S. 546 (1941) is fully consistent with the other cases construing the custody requirement. Hull was a habitual sex offender who was convicted of one offense, paroled, and within a year convicted of another. *Id.*, at 547. "Apparently for the *sole* reason that the second conviction was regarded as a violation of his parole," his parole on the first offense was revoked. *Ibid.* (emphasis added). In holding that the second conviction could be reviewed, and distinguishing *McNally*, the Court again noted that parole was revoked only because of the second conviction, *id.*, at 549-550, with the clear implication that Hull would be restored to parole if the second conviction were invalidated.

Parker v. *Ellis*, 362 U. S. 574 (1960) was a straightforward application of these traditional principles. Parker's sentence had expired pending this Court's review, *id.*, at 575, and thus *Baez*, *supra*, and *Lincoln*, *supra*, were squarely on point. There was nothing further a habeas corpus court could do for him. Justice Harlan noted in a concurring opinion that even collateral effects of the conviction were moot, since Parker had numerous other felony convictions. *Id.*, at 576.

Chief Justice Warren's dissent shows why there was a movement to extend habeas review to such cases. In this pre-*Gideon* case, Parker was tried for a felony without an attorney, denied a transcript for his appeal, and also denied an attorney for the appeal. *Id.*, at 580-581, and n. 6. The problems that created Parker's predicament have, of course, long since been corrected. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (trial counsel); *Douglas* v. *California*, 372 U. S. 353 (1963) (appellate counsel); *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (transcript, decided after Parker's direct appeal).

Jones v. *Cunningham*, 371 U. S. 236 (1963) is fully consistent in its result with the earlier cases. The holding of the case is just the unremarkable proposition that a parolee remains in the custody of the parole board, as both the statute and the parole order in question clearly stated. See *id.*, at 241-242. The case is significant only for Justice Black's rhetorical flourish, saying the writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Id.*, at 243. This gratuitous dictum about growth would be invoked ever after by those who sought to make the writ into a substitute for appeal, which the Court had always denied it was. See, *e.g.*, *Sunal* v. *Large*, 332 U. S. 174, 178 (1947); accord *Reed* v. *Farley*, 129 L. Ed. 2d 277, 292, 114 S. Ct. 2291, 2300 (1994).

B. The Expansive View.

We have discussed the older cases at some length to illustrate just how much precedent was perfunctorily tossed out in the five-year period from 1968 to 1973. If tradition is to be the touchstone of the present case, that tradition weighs heavily against extension of these cases, "by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

Peyton v. *Rowe*, 391 U. S. 54, 67 (1968) overruled *McNally*. There are three reasons given. First, there were compelling practical considerations in Rowe's case indicating that if federal habeas did not presently extend to his claim it might never be adequately heard in any forum. Second, there was a historical attack on *McNally*. Third, there was the quoted dictum from *Jones*, *supra*. Only the first is defensible, and it is inapplicable to the present case.

Rowe was convicted of rape and sentenced to 30 years in prison. *Id.*, at 55. He then pleaded guilty to "felonious abduction with intent to defile" the same victim and received another consecutive term of 20 years. *Id.*, at 55-56. His claims of ineffective assistance, double jeopardy, and involuntary plea were never heard in state court, because the state followed *McNally*. *Id.*, at 56, and n. 2.

Beyond question, there were powerful practical reasons for litigating the ineffective assistance claim promptly and not 30 years hence. Collateral attacks on guilty pleas "that seek to probe murky memories" are notoriously difficult. *Boykin* v. *Alabama*, 395 U. S. 238, 244 (1969); *Parke* v. *Raley*, 121 L. Ed. 2d 391, 407, 113 S. Ct. 517, 524-525 (1992). Such a proceeding three decades hence would be a mockery.

These practical considerations are inapplicable to Garlotte's case. Jurisdiction exists now or never. Recognizing this, petitioner contends that practical considerations could not be the basis for *Peyton*, because practicality is insufficient to surmount a jurisdictional barrier. Brief for Petitioner 14, n. 9. There is certainly good authority for this principle, see, *e.g.*, *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 294 (1970), but if applied to *Peyton* it would call for overruling that case, not extending it. In any event, this Court has adopted extremely strained constructions of habeas jurisdictional requirements when necessary to see that an otherwise cognizable claim will be heard in other contexts. See *McFarland* v. *Scott*, 129 L. Ed. 2d 666, 674, 114 S. Ct. 2568, 2571-2572 (1994). It almost goes without saying that such stretches should not be stretched beyond the practicalities which require them.

When it sought to attack the historical basis of *McNally*, the *Peyton* Court lapsed into the regrettable historical disingenuousness that characterizes the habeas decisions of this period. See generally Mayer, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451 (1966); *Fay* v. *Noia*, 372 U. S. 391, 449-463 (1963) (Harlan, J., dissenting). The *Peyton* Court asserts there was only one prior decision, *Swan*, *supra*, supporting the *McNally* rule of prematurity. *Peyton*, 391 U. S., at 65, n. 18. Not so. See *Tinsley*, *supra*, 171 U. S., at 107. It asserted that *Hull* granted habeas review to a petitioner who would not be released if he prevailed. 391 U. S., at 67. Not so. See *ante*, at 12.

Worst of all, *Peyton*'s comments about the scope of relief available on habeas, *id.*, at 66-67, simply ignore *Wales*, *Baez*, *Lincoln*, and *Stallings*. See *ante*, at 10-11. While these cases

might have been distinguished, the failure to do so while making a blanket statement set the stage for their overruling.

Carafas v. *La Vallee*, 391 U. S. 234 (1968) was decided the same day. Carafas's case was far less compelling. He had been convicted of burglary and larceny in a pre-*Mapp* trial with evidence he claimed was illegally seized, a claim rejected on the merits in his post-*Mapp* appeal. *Id.*, at 235-236, and n. 1. The federal district court also rejected his claim on the merits, and the Second Circuit dismissed his appeal. He was released from custody while his certiorari petition was pending. *Id.*, at 236.

Parker v. *Ellis*, *supra*, *Ex parte Baez*, *supra*, and *Re Lincoln*, *supra*, were all on point. Following the pattern set in *Peyton*, the *Carafas* Court proceeded to attack the most recent decision, *Parker*. It mentioned *Baez* only in passing in a footnote, 391 U. S., at 238, n. 12, and completely ignored *Lincoln*.

Rejecting the uniform line of habeas authority, *Carafas* said the case was not moot, citing two direct review cases and one coram nobis case. *Id.*, at 237-238. Reliance on the coram nobis case, *United States* v. *Morgan*, 346 U. S. 502 (1954), is especially peculiar, because that case extended common law coram nobis to an out-of-custody federal convict precisely *because* he was no longer eligible for habeas or 28 U. S. C. § 2255. See *Morgan*, 346 U. S., at 504, 512-513.

It is true enough, as *Carafas* says, that "collateral consequences" exist from a fully expired state felony conviction. 391 U. S., at 237-238. But it is far from "clear" that the habeas case was not moot, for it is not clear that Congress has ever empowered the lower federal courts to grant relief from such collateral consequences. The traditional view was that, when a judgment had multiple consequences including custody, habeas reached only the custody and let the others stand. The habeas court's "power *then* extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the [convicting] court." *Wales* v. *Whitney*, 114 U. S. 564, 570 (1885) (emphasis in original).

The statutory language relied on by *Carafas*, 391 U. S., at 239, is not to the contrary. The "law and justice require" language was in the statute well before *Wales*. See R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of

Habeas Corpus 648 (2d ed. 1876). The more recent "other remedy" language refers to the effect of a prior *denial* and cannot be considered a new grant of power.

The last major case in the series is *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973). Hensley ran a diploma mill churning out dubious Doctor of Divinity degrees, for which he was sentenced to a year in jail and a fine, but the state courts generously released him on his own recognizance while he pursued his appeals. *Id.*, at 346-347, and n. 2. The only restrictions under this status are an agreement to appear in court when required and waiver of extradition if apprehended outside the state. *Id.*, at 348.

In an opinion joined by a bare majority of the Court, Justice Brennan declared that Hensley was "in custody" for the purpose of the statute. *Id.*, at 353. A long line of precedent was contrary, including *Wales*, *supra*, *Stallings*, *supra*, *Johnson* v. *Hoy*, 227 U. S. 245 (1913), and *Baker* v. *Grice*, 169 U. S. 284 (1898). These cases were declared "no longer controlling" on the remarkable ground that they were *not* mentioned in *Peyton*, *Carafas*, and *Jones*. 411 U. S., at 350, n. 8. A decent respect for the values underlying *stare decisis* would normally point to the opposite conclusion. Where a recent decision has ignored a long line of earlier contrary authority, the recent aberration should be recognized as such and corrected. "[T]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986), should not tolerate overruling by ignoring. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51, 58, n. 30 (1977); *United States* v. *Moreland*, 258 U. S. 433, 436 (1922).

The threadbare nature of petitioner's reliance on this line of cases is illustrated by his statement that "the writ's operation 'is to a large extent uninhibited by traditional rules of finality and federalism.' " Brief for Petitioner 26, quoting *Hensley*. That was true only in the comparatively narrow slice of judicial history to which *Hensley* belongs. It was not true earlier, see, *e.g.*, *Ex parte Royall*, 117 U. S. 241, 251-252 (1886) (federalism, exhaustion); *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) (finality, habeas court will "not ordinarily re-examine" claims litigated in state court), and it is not true now.

Hensley's denigration of the finality interests is in tune with *Fay* v. *Noia*, *supra*, which has since been overruled precisely because it denigrated those interests. "*Fay* was based on a conception of *federal/state relations* that undervalued the importance of state procedural rules . . . . We now recognize *the important interest in finality* served by state procedural rules . . . ." *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (emphasis added). Just as renewed recognition of the importance of finality and federalism resulted in reestablishment of the procedural default rule, so should it result in the refusal to extend any further the expansive view of "custody" left over from the *Fay* era.

The result in *Hensley* is perhaps defensible on the facts of the case on practical grounds. As in *Peyton*, habeas jurisdiction would attach in the future, so it was merely a question of when, not if, the case would be heard in federal court. *Hensley*, 411 U. S., at 352. Again as in *Peyton*, these practical considerations do not justify an uncritical adoption of *Hensley*'s bombastic denunciation of traditional limits on the scope of habeas corpus as "stifling formalisms" and "manacles of arcane and scholastic procedural requirements." See *id.*, at 350. It is precisely because habeas corpus is so powerful, being exempt from the usual rule of res judicata, that it must be kept within limits.

C. Reassertion of Limits.

This point was recognized in *Lehman* v. *Lycoming County Children's Services*, 458 U. S. 502, 512-513 (1982). *Lehman* involved child custody disputes, a species of litigation where the finality interest is exceptionally strong. *Id.*, at 513-514. Yet it does involve a construction of the custody requirement, and it frankly adopts a cost-benefit approach to that question. "The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns." *Id.*, at 515-516.

Finally, the limits of "custody" were again reasserted in this Court's most recent word on the subject, *Maleng* v. *Cook*, 490 U. S. 488 (1989). The Ninth Circuit had held, in a remarkable extension of *Carafas*, that Cook was still in custody under a

sentence which expired ten years earlier, because that conviction had been used to enhance a subsequent conviction. *Id.*, at 489-490. This Court reversed. "While we have very liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction." *Id.*, at 492.

The Court noted that the jurisdictional custody requirement was met for attacking the second conviction, but expressed no view on the substantive question of whether errors in the prior proceeding would be grounds for relief. *Id.*, at 493-494. Cf. *Custis* v. *United States*, 128 L. Ed. 2d 517, 528, 114 S. Ct. 1732, 1738 (1994) (attack on prior at sentencing limited to *Gideon* claims).

III. No federal interest in this case outweighs the federalism and finality concerns.

This case, *amicus* submits, comes down to the *Lehman* question. The answer is not dictated by prior opinions, nor does it clearly follow from the words of the statute. Is this an "instance[] in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns"? *Lehman*, *supra*, 458 U. S., at 516.

In part I, *ante*, at 3-9, we discussed the cost of habeas litigation to the state in cases where relief is ultimately denied. A secondary, but also significant, cost is the possibility that the "corrective" process will introduce new error into a previously error-free case. For example, in *Dunn* v. *Simmons*, 877 F. 2d 1275, 1279 (CA6 1989), cert. denied *sub nom. Simmons* v. *Dunn*, 494 U. S. 1061 (1990), a federal court said that a certain state procedure did "not comply with federal standards." Three years later, too late to correct this error, this Court held without dissent that the procedure in question "*easily* passes constitutional muster." *Parke* v. *Raley*, 121 L. Ed. 2d 391, 403, 113 S. Ct. 517, 522 (1992) (emphasis added). The state thus has powerful interests both in avoiding the costs of habeas relitigation and in avoiding the erroneous overturning of its valid judgments.

In *O'Neal* v. *McAninch*, No. 93-7407 (U. S., Feb. 21, 1995), this Court emphasized that habeas corpus was different from other civil proceedings, because "someone's custody, rather than mere civil liability, is at stake." *Id.*, slip op., at 7. The Court further noted that "we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person." *Id.*, slip op., at 9. Taken together, these statements indicate the kind of federal interest thought to justify relitigation on habeas corpus. The possibility that a person who may be innocent was convicted in violation of his constitutional rights and remains in prison is a risk which justifies relitigation. If the outcome is positive that a violation occurred but is ambivalent about whether it was harmful, the risk of wrongful imprisonment outweighs the risk of a wrongful acquittal on retrial. *Id.*, slip op., at 10.

Garlotte is most definitely not an innocent man. He has been convicted, in a judgment not challenged here, of murdering two people. If he is never paroled, his punishment is no greater than he deserves, and perhaps less.[7]

Garlotte contends that this case involves his custody under the marijuana charge because he will be *eligible* for parole ten months earlier if that charge is set aside. Brief for Petitioner 19, n. 14. Assuming that to be true for the sake of argument,[8] it is pure speculation that the parole authorities actually would parole this double murderer in the first ten months of his eligibility.

Is this speculative possibility the kind of grave injustice that justifies relitigation in federal court of claims already considered and rejected in state court? Regardless of what happens in this case, Garlotte's time in prison will be within the range of punishment authorized for the crime of murder. There is *no* possibility of an unjust incarceration in this case.

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7. If he should successfully challenge those convictions, his marijuana sentence having been served, he would be entitled to immediate release or retrial.

8. The Attorney General is far better able than *amicus* to discuss Mississippi parole law, and so we will not attempt it.

In other cases under other sentencing systems, it is possible that, under the rule applied by the Court of Appeals, a person who is guilty of one crime but sentenced for two could serve a somewhat longer sentence than the law prescribes for the second, valid conviction. Returning to our earlier hypotheticals, see *ante*, at 8, prisoner C would serve five years for burglary and robbery, when it is conceivable he should have only served four years for robbery. This would occur *if* C's claims have merit, which escaped the notice of the state courts, and *if* he is actually innocent.

Both of these "ifs" are unlikely, and they are especially unlikely together. We have already discussed how rare it is for a meritorious claim to get past the state courts. *Ante*, at 6. This Court recently noted how exceedingly rare it is for a substantial claim of actual innocence to make it to federal habeas corpus. *Schlup* v. *Delo*, No. 93-7901 (U. S., Jan. 23, 1995) slip op., at 22-23. The great number of issues cognizable on habeas corpus having little or no connection to the integrity of the fact-finding process, see *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens, J., dissenting); *Vasquez* v. *Hillery*, 474 U. S. 254, 267 (1986) (O'Connor, J., concurring in the judgment), makes these two conditions largely independent. The intersection of two small and substantially independent subsets of the very large class of criminal cases is a very small set indeed.

And what is the magnitude of this vanishingly rare occurrence? It is a properly convicted felon spending a year or possibly two longer in prison than the law of jurisdiction prescribes for the second, valid conviction. That is a lesser, or perhaps equal, injustice compared to the case of a completely innocent man jailed for a year on a single offense, yet the latter case is "below the radar" of federal habeas corpus. (Prisoner A in our hypotheticals, *ante*, at 8.)

Amicus does not denigrate the importance of constitutional rights, and we do not imply that wrongful conviction on one charge is not unjust if the defendant is actually guilty of another. Our point is that perfection is unachievable, and we cannot chase after vanishingly small probabilities forever. See *ante*, at 6. The extremely low grant rate in noncapital cases demonstrates that state courts today *are* diligently protecting constitutional

rights.[9] The sometimes stunningly wrong decisions of the lower federal courts, such as *Dunn* v. *Simmons*, *supra*, show that a grant of habeas corpus does not necessarily mean an error actually occurred.

A custodial sentence which remains unexpired on the day the federal petition is filed is the threshold "amount in controversy" for federal habeas relitigation of a single offense; lesser offenses are trusted to the judgment of the state courts, subject only to this Court's review on certiorari. If a second, consecutive, unchallenged sentence for a different offense has any effect on the risk versus cost calculus, it is only to diminish the magnitude of the risk. It cannot tip the balance in the opposite direction.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

March, 1995

Respectfully submitted,

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9. The insulting assumption that state court judges will only do their duty under threat of having their decisions overturned on habeas, see *Butler* v. *McKellar*, 494 U. S. 407, 430, n. 12 (1990) (Brennan, J., dissenting), requires far more justification than has been offered for it to date.